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No. 86-1575

In the Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE, STATE OF MISSISSIPPI, PETITIONER

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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1988

QUESTION PRESENTED

Whether, under 12 U.S.C. 36, national banks may establish branches to the same extent as state savings associations, in a state where those associations are actively engaged in the business of banking in competition with national banks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-44a) is reported at 809 F.2d 266. The opinion of the district court (Pet. App. 21a-31a) is reported at 617 F. Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. The petition for a writ of certiorari was filed on March 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(c) of the McFadden Act (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may do so, however, only

to the extent that "such establishment and operation are at the same time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). The term "State banks" is in turn defined "to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." 12 U.S.C. 36(h).

In September 1984, respondent Deposit Guaranty National Bank (Deposit Guaranty), a national bank with its principal office in Jackson, Mississippi, applied to the Comptroller of the Currency for permission to establish a branch in Gulfport, Mississippi (Pet. App. 1a). Deposit Guaranty recognized that the Mississippi law then in force would not permit a state-chartered commercial bank based in Jackson to open such a branch, because state law permitted commercial banks to establish branches only within a 100-mile radius of their parent offices (Miss. Code Ann. § 81-7-7 (1972 & Supp. 1986)), and Gulfport is more than 100 miles from Jackson. Deposit Guaranty therefore based its application in large part on a factual showing that Mississippi *savings associations*, which were permitted under state law to branch state-wide (Miss. Code Ann. § 81-12-175 (Supp. 1986)), were actively engaged in the business of banking in competition with national banks. Accordingly, Deposit Guaranty argued, these competing institutions must be considered "State banks" within the meaning of Section 36(c) and (h), and national banks should be accorded the same state-wide branching authority that state savings associations enjoy.

The Comptroller granted Deposit Guaranty's application (Pet. App. 1a-20a). Relying on this Court's holding in *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), the Comptroller explained that the interpretation of the term "State banks," as used in Section 36(c) and defined in Section 36(h), is a question of federal law (Pet. App. 6a-7a). And because Section 36(h) defines "State banks" as

those institutions engaged, pursuant to state law, in "the banking business," the Comptroller ruled that the determination whether particular institutions are acting as "State banks" turns on whether they are, in fact, conducting those activities traditionally denoted as "banking" (Pet. App. 13a-15a). Looking for guidance to the National Bank Act, 12 U.S.C. 24 Seventh, and the decisions of this Court (see Pet. App. 15a (citing *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)), the Comptroller identified the essential activities characteristic of the "banking business" as the taking of deposits, the making of loans, and the cashing of checks (Pet. App. 14a-15a).

In this case, the Comptroller concluded that recent changes in both Mississippi and federal law permit Mississippi savings associations to offer "an 'entire menu' of financial services, including the essential functions of accepting deposits, making loans and paying checks (or their functional equivalents, negotiable orders of withdrawal)" (Pet. App. 16a; see *id.* at 17a). And on the record here, the Comptroller found that Mississippi savings associations are in fact "offering a range of products and services in competition with commercial banks, including NOW accounts, auto and other consumer loans, construction loans, and commercial loans. Furthermore, Mississippi savings associations have been actively marketing such products and services, often referring to them as 'banking' products and services or to themselves as 'banks.' " *Id.* at 19a (citation omitted). The Comptroller also considered evidence indicating that a substantial percentage of Mississippi households obtain their banking services from savings associations (*id.* at 19a-20a).

On the basis of this factual record, the Comptroller concluded that "Mississippi-chartered savings associations now offer a range of products and services that constitute the 'business of banking,' " and that those institutions are

therefore "in fact, carrying on the business of banking under authority of state laws" (Pet. App. 20a). Accordingly, the Comptroller ruled that Mississippi savings institutions are "State banks" within the meaning of the McFadden Act, and that Section 36(c) permits national banks to branch to the same extent as those savings institutions (*ibid.*).

2. Petitioner and several state commercial banks then brought this action in the United States District Court for the Southern District of Mississippi against the Comptroller and Deposit Guaranty, seeking both declaratory relief and an injunction against the opening of Deposit Guaranty's Gulfport office. Petitioner argued, as it had to the Comptroller, that the term "State banks" in Section 36(c) must be interpreted solely by reference to state law, a reading that would permit national banks to branch only to the same extent as those state-chartered institutions that the state chooses to label "banks" (Pet. App. 25a-26a). While finding petitioner's construction of the statute "not entirely persuasive," the district court nevertheless ruled in its favor, looking to "the legislative history of the McFadden Act and policy considerations" (*id.* at 26a). The court found dispositive its conclusion that the Comptroller's decision would give national banks a "competitive advantage" over state commercial banks (*id.* at 28a-29a); the court did not discuss the possible advantage that state savings associations now have in their competition with national banks.

The court of appeals reversed (Pet. App. 35a-44a). Recognizing that it was obligated to uphold the Comptroller's interpretation of Section 36 if that interpretation was a " 'permissible construction' " of the statute (Pet. App. 39a, quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)), the court of appeals agreed with the Comptroller that the interpretation of the term "State banks" in Section 36(c) and (h) is a question of

federal law. And the court also "agree[d] with the Comptroller that the language of § 36(h) expressly requires a consideration of function," "hold[ing] that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as 'savings banks,' were actually 'carrying on the banking business' " (Pet. App. 42a). In making this observation, the court endorsed the Comptroller's conclusion that "the business of banking, stripped to its essentials, [is] accepting deposits, paying checks, and making loans" (*ibid.*; see *id.* at 37a).

Turning to the record, the court noted that the Comptroller's factual findings must be upheld unless "arbitrary or capricious" (Pet. App. 43a (citing 5 U.S.C. 706)). And here, the court concluded that the Comptroller's conclusions were "amply supported by the record" (Pet. App. 43a): Mississippi savings associations, "consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties" (*ibid.*). The court therefore upheld the Comptroller's ruling as "patently correct" (*ibid.*).

ARGUMENT

This case is the first in which the Comptroller, relying on a factual showing of actual competition between national banks and state-chartered savings institutions that are offering all of the essential banking services, treated such state institutions as "State banks" within the meaning of Section 36(c) and (h). His decision, as well as the holding below, plainly is compelled by the statutory language. The decision below, moreover, is unlikely to have continuing consequences, because a recent change in Mississippi law will eliminate the geographical distinction in the branching

authority of state-chartered commercial banks and savings associations. For all of these reasons, review of the decision below is unwarranted.

1. a. The decision below is based on the unremarkable proposition that the meaning of a federal statute is a matter of federal law. Here, the Comptroller concluded that the term "State banks" in Section 36(c) and (h) refers to all state financial institutions that offer essential banking services. See Pet. App. 41a. See generally *Chase Manhattan Bank* v. *Finance Admin.*, 440 U.S. 447 (1979); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959). Petitioner, on the other hand, urges (Pet. 8) a view of the statute under which state law—including the *labels* that state law applies to various institutions—determines whether a given institution is a "State bank" within the meaning of Sections 36(c) and (h). Under this view, the Comptroller would be required to analyze branching requests solely with reference to institutions that the state chooses to call "banks," whether or not other institutions perform the same functions as, and are in fact fully competitive with, national banks.

This Court rejected an identical approach to another term used in the McFadden Act—"branch," which is defined in 12 U.S.C. 36(f)—in *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). There the Court recognized that, while an analysis of the *substance* of state law plays a role in the Comptroller's decisions under the McFadden Act, state law labels cannot be controlling, since the states would then be "the sole judges of their own powers." *Id.* at 133. That Congress did not intend such an "improbable result" was, the Court held, obvious from the fact that Congress had provided a definition of the term "branch" in the statute itself. *Id.* at 133-134. Similarly, Congress' decision to define "State banks" in Section 36(h) to include all "corporations or institutions carrying on the

banking business under the authority of State laws" demonstrates its intent that such "banks" be identified by their banking activities, rather than by state law labels.

Petitioner attempts to avoid this conclusion by reference to the McFadden Act's general policy of "competitive equality" between national and state banks (Pet. 11). See generally *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 20. In this case, however, that policy weighs on both sides of the scale, and on balance supports the Comptroller's determination. While the Comptroller's decision here may give national banks in Mississippi greater branching authority than that enjoyed by state commercial banks, a contrary ruling would give state savings associations—which were found by the Comptroller and the court below to be in competition with national banks—a significant competitive advantage over national banks.

Resolution of this dilemma, created by the rapidly changing competitive situation in the financial services industry, is precisely the sort of matter on which deference to an agency's statutory interpretation should be at its height. See *Independent Bankers Ass'n* v. *Marine Midland Bank*, 757 F.2d 453, 461 (2d Cir. 1985), cert. denied, No. 84-2023 (June 16, 1986). And here, as the court of appeals indicated, the Comptroller's resolution serves the fundamental congressional purpose of maintaining competitive equality between state and federal banking by ensuring that " 'neither *system* have advantages over the other in the use of branch banking' " (Pet. App. 41a, quoting *Plant City*, 396 U.S. at 131 (emphasis added)).

b. Petitioner appears to argue that, if national banks are permitted branching authority equivalent to that of state savings asociations, national banks must comply with all of the state-imposed substantive restrictions on the activities

of those associations.[1] But the McFadden Act, in Section 36(c) (emphasis added), applies to national banks only "restrictions *as to location* imposed by the law of the State." As the emphasized language makes clear, this section incorporates only state limitations on branching, not the provisions of state law that regulate the substance of the activities of financial institutions. *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), on which petitioner chiefly relies (Pet. 9-11), involved just such a branching restriction. There the Court held that the limitation in question—a state law that permitted the establishment of a branch only through acquisition of an existing bank—was part and parcel of the state's branching policy, "express[ing] as much 'whether' and 'where' a branch may be located" as a strictly geographical restriction (385 U.S. at 262). The Court did not suggest that a state could compel a national bank to comply with regulatory restrictions of substantive state banking law as a condition of enjoying the banking privileges accorded to "State banks."

Indeed, the McFadden Act itself expressly provides that institutions differing from commercial banks in some particulars—"trust companies" and "savings banks"—may qualify as "State banks" whose branching authority sets the standard for branching by national banks. 12 U.S.C. 36(h). Yet Congress could hardly have intended the substantive state law restrictions on those types of institutions to be applicable to national banks.

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[1]As petitioner notes, Mississippi law imposes certain restrictions on state savings associations that are not applicable to state commercial banks, such as percentage limitations on the amount of their assets that they may devote to given classes of lending (Pet. 5). But petitioner has never challenged the Comptroller's factual findings that, notwithstanding such limitations, Mississippi savings associations are actively and successfully engaged in a range of activities that in fact constitute the business of banking, in competition with national banks (Pet. App. 19a-20a).

2. The conflict in the circuits asserted by petitioner on this point is illusory. In *Mutschler* v. *Peoples Nat'l Bank*, 607 F.2d 274 (1979), upon which petitioner principally relies (Pet. 8-9), the Ninth Circuit held only that a Washington "mutual savings bank" was not a "State bank" within the meaning of Section 36(c); the court concluded that "national banks cannot locate branches where under Washington law mutual savings banks [but not commercial banks] may locate as it would thus destroy the concept of competitive equality embodied in the [McFadden Act]." 607 F.2d at 280. While the Ninth Circuit looked to state law in reaching that conclusion (see *id.* at 279), it did so (as its reliance on notions of competitive equality make clear) in the absence of any indication that mutual savings banks in Washington in fact offered a full range of banking services in competition with national banks. Indeed, it appears that there was no evidence at all before the court of appeals (or the district court) about either the activities of mutual savings banks or the actual competitive situation in the state.[2] Thus, it is far from clear whether, if faced with a case comparable to this one—involving a set of state-chartered institutions that are empowered to, and do in fact, offer a full range of banking services in competition with national banks—the Ninth Circuit would take a position in conflict with the decision below.[3]

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[2]In fact, no evidentiary record was made before the Comptroller. See Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. Law & Comm. 243, 252 (1983). See also *Hart* v. *Peoples Nat'l Bank of Washington*, No. C75-416S (W.D. Wash. Feb. 18, 1976).

[3]It is doubtful that the Ninth Circuit will ever have occasion to consider such a case, because it appears that none of the states in that circuit afford savings institutions broader branching authority than commercial banks. See Pet. 12 n.6. Moreover, the holding of *Mutschler* itself is a dead letter; the State of Washington has amended its banking statute to permit branching of the sort disallowed in that case. See Wash. Rev. Code § 30.40.020 (West 1986 & Supp. 1987) (as amended by Laws 1986, ch. 279, § 39). We also note that the only federal

Petitioner's reliance on *Dakota Nat'l Bank & Trust Co.* v. *First Nat'l Bank & Trust Co.*, 554 F.2d 345 (8th Cir.), cert. denied, 434 U.S. 877 (1977) (Pet. 9), is also misplaced. The issue in that case was whether a state-owned financial institution was a "State bank" within the meaning of Section 36(h). The court held only that the state institution was "in effect an arm of the state of North Dakota," and concluded that "competitive equality was intended to be maintained between the privately-owned banking institutions, state and federal, rather than between the national banks and the *state itself* in its banking endeavors." 554 F.2d at 356 (emphasis in original). That holding obviously has no relevance here.

3. Finally, even if the question presented in this case were otherwise appropriate for consideration by this Court, a compelling prudential factor militates against review: the decision below will not have continuing effects. Prior to the court of appeals' ruling in this case, the State of Mississippi amended its banking law to phase out the geographic limitations on branching by commercial banks. This phase-out begins on July 1, 1987 (when the 100-mile limit will be extended to 150 miles), and will be concluded on July 1, 1989 (when state-wide branching will be permitted). See Miss. Code Ann. § 81-7-7 (Supp. 1987). Thus, a ruling by this Court on the merits of this case would have only a limited practical impact.

In an attempt to demonstrate the importance of the issue here, petitioner suggests that 22 states grant broader branching authority to certain savings institutions than to

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authority cited by the court of appeals in *Mutschler* was the district court opinion in *State Chartered Banks* v. *Peoples Nat'l Bank*, 291 F. Supp. 180 (W.D. Wash. 1966). *State Chartered Banks* (upon which petitioner also relies, Pet. 9 n.5) was decided prior to this Court's ruling in *Plant City*, and expressly adopted the now-discredited view that Section 36(f)'s definition of "branch," as well as Section 36(h)'s definition of "State bank," is controlled by state law. See 291 F. Supp. at 196.

commercial banks (Pet. 11-13 & n.6). But the issue presented in this case can arise only in a state that also allows state savings institutions to engage in the business of banking in competition with national banks (and with state commercial banks). Determining whether that is the case in any given setting requires a factual inquiry by the Comptroller. Indeed, in the time since the Comptroller granted Deposit Guaranty's application, he has taken final action in only one other similar case, and in that case *denied* the branching application—by a Georgia bank—on the ground that the application "fail[ed] to demonstrate that the state-chartered thrifts in Georgia are indeed 'carrying on the banking business.' "[4] Petitioner's concern that the issue here will arise in the future is thus wholly hypothetical.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

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[4]See March 31, 1987, letter from Ballard C. Gilmore, Director for Corporate Activity, Bank Organization and Structure, to Richard R. Cheatham (attached as an appendix to this brief).

APPENDIX

Comptroller of the Currency
Administrator of National Banks
Washington, D.C. 20219
March 31, 1987

Mr. Richard R. Cheatham
Kilpatrick & Cody
Suite 3100
100 Peachtree Street
Atlanta, Georgia 30043

Dear Mr. Cheatham:

This is to inform you that the request by First South Bank, National Association, Fort Valley, Georgia, to establish a branch at the intersection of Cherry and First Streets, Macon, Georgia, has been disapproved. This Office is authorized by 12 U.S.C. 36 to approve applications for national banks to establish branch offices at locations "authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively." The term "State bank" is defined in 12 U.S.C. 36(h) as those institutions which are "carrying on the banking business" under state law. The application fails to demonstrate that the state-chartered thrifts in Georgia are indeed "carrying on the banking business."

Sincerely,

/s/ BALLARD GILMORE
Ballard C. Gilmore
Director for Corporate Activity
Bank Organization and Structure